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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

VIRGIL G. CARROLL, HARRY B. HOGAN, doing business as HARRY B. HOGAN PAINTING COMPANY, and ST. PAUL-MERCURY INDEMNITY COMPANY ..... *Petitioners*

v. No. 375

M. LANZA, doing business as LAKE CHARLES ELECTRIC COMPANY ..... *Respondent*

REPLY BRIEF FOR PETITIONERS

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October 26, 1954

PARAGON PRINTING CO., LITTLE ROCK

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ARGUMENT

I. *There Is a Conflict of Decision*

Throughout the time that Carroll was receiving compensation payments under the Missouri Workmen's Compensation Act, he did not know that he had the right to claim compensation benefits under the Arkansas Workmen's Compensation Act (R.35-37). Respondent, in his brief, has not undertaken to explain away this fact which, as was pointed out on page 5 of the petition, is undisputed; in fact, although it is the point upon which the case turns, he does not even refer to it.

The Court of Appeals manifestly overlooked this decisive fact when it held that Carroll had " 'elected' to come

within the coverage of the Missouri law and to recover his compensation under that law" (Appendix to Petition, p. xiv). Despite respondent's argument to the contrary (Br. 5), it is very clear that the Court of Appeals reversed the judgment for petitioners on the ground that Carroll had formally elected his remedy under the Missouri Act and that Missouri law must therefore be applied in determining whether a common law action for negligence could be maintained. Under the Missouri Act, the action cannot be maintained. *Bunner* v. *Patti*, 343 Mo. 274, 121 S.W. 2d 153, and *New Amsterdam Casualty Co.* v. *Boaz-Kiel Construction Co.*, 8 Cir., 115 F. 2d 950 (Petition, p. 5); under the Arkansas Act, it can be maintained. *Anderson* v. *Sanderson & Porter*, 8 Cir., 146 F. 2d 58 (Petition, p. 4).

On pages 4 and 10 of his brief, respondent points out that the Supreme Court of Arkansas has never passed upon the question whether the Arkansas Act would bar the present action. That is true. *The Baldwin Company* v. *The Circuit Court of Hot Spring County, Arkansas, Honorable Ernest Maner, Judge*, No. 572, Supreme Court of Arkansas, is a petition for writ of prohibition in which this one issue is now being squarely presented to that Court. That case will probably be decided in January, 1955. If this Court has any misgivings about the correctness of the rule of the *Anderson* case, petitioners respectfully suggest that action upon this petition for writ of certiorari be deferred until after *The Baldwin Company* case is decided.

Ohlhaver v. *Narron*, 4 Cir., 195 F. 2d 676, *Jonathan Woodner Company* v. *Mather*, D.C. Cir., 210 F. 2d 868, and *Bradford Electric Company* v. *Clapper*, 286 U.S. 145, 76 L. Ed. 1026, 52 S. Ct. 571, relied upon on pages 7-10 of respondent's brief, are wholly irrelevant. None of them involves the issue presented in the case at bar, namely,

whether a party can be held to have elected one remedy when he was unaware of an inconsistent remedy.

Respondent's purpose in citing those cases may have been to urge upon this Court the theory that the Missouri Act is exclusive as to all Missouri residents (such as Carroll) whose contract of employment was made in Missouri and that Arkansas does not have the right to provide workmen's compensation for those employees even though they are injured in Arkansas. If such was his purpose, his point is not well taken, since this Court is firmly committed to the doctrine that "few matters could be deemed more appropriately the concern of the state in which the injury occurs or more completely within its power" than legislation "for the bodily safety and economic protection of employees injured within it" and that the "application of the full faith and credit clause" cannot "override the constitutional authority" of a state (as, for example, Arkansas) to enact such legislation even though another state (as, for example, Missouri) has attempted to make its compensation act exclusive as to all its employees. *Pacific Employers Insurance Company* v. *Industrial Accident Commission*, 306 U. S. 493, 503, 83 L. Ed. 940, 59 S. Ct. 629.

The courts uniformly hold that "election" involves choice, and that there can be no election unless, at the time it is alleged that an election was made, the party had full knowledge of the nature of his inconsistent rights and an opportunity to choose between them (Petition, pp. 12-15). Respondent does not take issue with this principle, but simply ignores it. When the principle is applied, the result is that the decision of the Court of Appeals is in conflict with the opinions of numerous courts, both state and federal; in fact, the decision finds no support in any jurisdiction.

II. *The Court Incorrectly Interpreted the Import of the Case of Magnolia Petroleum Company* v. *Hunt*

Respondent is hard pressed indeed to advance a plausible reason for the applicability of *Magnolia Petroleum Company* v. *Hunt*, 320 U.S. 430, 88 L.Ed. 149, 64 S. Ct. 208. As was pointed out on page 15 of the petition, Carroll never obtained an award of compensation from the Missouri Workmen's Compensation Commission and never even filed his claim with that commission.

Respondent now says that "it is customary in Missouri, in uncontested compensation cases, for the Act to be implemented by the payment and receipt of compensation, without any requirement that there be any formal claim or formal award". If such a custom exists, it devolved upon respondent to establish it. The record shows respondent did not undertake to do this. Even if such a custom had been shown to exist in Missouri, it would have availed respondent nothing, since the full faith and credit clause (Constitution of the United States, Article 4, Section 1) does not cover customs but is referable only to "the public acts, records and judicial proceedings" of a state.

CONCLUSION

When the case was tried in the District Court in November, 1953, and judgment for $18,000.00 was rendered in favor of petitioners, Carroll was receiving his compensation payments under the Arkansas Act which, as construed in the *Anderson* case, permits a common law action for damages to be maintained in such a suit as this. The opinion of the Court of Appeals, which reversed that judgment on the ground that Carroll had theretofore " 'elected' to come within the coverage of the Missouri law and to recover his compensation under that law", is in conflict with opinions of this Court, other courts of appeals and appellate courts in Arkansas, Missouri and other states, the undisputed proof being that Carroll was not aware of his rights under the Arkansas Act at any time while he was receiving compensation payments under the Missouri Act.

By reason of this conflict of decision, the petition for writ of certiorari should be granted.

Respectfully submitted

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October 26, 1954

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v. No. 375

M. LANZA, DOING BUSINESS AS LAKE CHARLES ELECTRIC COMPANY ..... *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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PARAGON PRINTING CO., LITTLE ROCK

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STATEMENT OF THE CASE

Respondent's statement of the case (Br.2-4) is conspicuous for its omission to include the uncontradicted fact that it was not until October 10, 1953, that Carroll learned for the first time that he could have claimed workmen's compensation benefits under the Arkansas Workmen's Compensation Act (See R. 35-37; Petrs'. Orig. Br.8). This is the circumstances which led the District Court to apply the doctrine of election of remedies by holding that it was not until that day "that Carroll exercised a conscious choice between two inconsistent remedies and it was not until then that he made an election as to which Act (*i.e.*, Missouri or Arkansas) he desired to govern his compensation payments" (R.59).

Respondent's failure to include a statement of this fact is consistent with his position throughout this litigation, which is that the doctrine of election of remedies has no place in the consideration of this case. Petitioners maintain that the omitted fact is decisive and controlling.

ARGUMENT

In this reply brief, petitioners have arranged their argument under headings which correspond to those in respondent's brief.

I

Carroll Did Not "Elect" to Come Within the Coverage of the Missouri Act

In petitioners' original brief (pp.20-24), the doctrine of election of remedies was fully considered. In his brief, respondent did not reply to petitioners' argument on this point, evidently for the reason that he does not consider that the doctrine is involved. Petitioners submit that the determination of this case depends upon the proper application of that doctrine, and that, when the doctrine is applied, this Court should conclude that Carroll never elected to claim compensation benefits under the Missouri Workmen's Compensation Act.

In the course of its opinion, the Court of Appeals said (216 F. 2d 815; R.146):

> "But the fact remains that Carroll, as a matter of Missouri law, 'elected' to come within the coverage of the Missouri law and to recover his compensation under that law".

On page 5 of his brief, respondent notes that, "when the word 'elected' was used in the opinion of the Court of Appeals, it was placed in quotations". The very fact that the Court of Appeals put that word "in quotations" shows that the Court was thereby applying the doctrine of election of remedies. Petitioners pointed out on pages 8-10 of their original brief that, in applying that doctrine by holding that Carroll had "elected" to have his rights de-

termined under the Missouri Act, the Court of Appeals overlooked the uncontradicted fact that, throughout the period he was receiving benefits under the Missouri Act, he was unaware of his rights under the Arkansas Act (See R.32-37).

In reversing the judgment of the District Court in the instant case, the Court of Appeals based its opinion largely upon *Magnolia Petroleum Company* v. *Hunt*, 320 U.S. 430, 88 L. Ed. 149, 64 S. Ct. 208 (See 216 F. 2d 808, 816; R.147). On pages 18 and 19 of the original brief, petitioners undertook to show that the *Hunt* case was not in point. Respondent now "concedes" that the case at bar "is not controlled" by the *Hunt* case (Br.6).

Respondent does contend, however, that the St. Paul-Mercury Indemnity Company, which had the workmen's compensation coverage on Hogan's employees, including Carroll (R.93), was duty-bound to object to the withdrawal of Carroll's claim from the Missouri Workmen's Compensation Commission and the lodgment of his claim with the Arkansas Workmen's Compensation Commission. Respondent argues that "it is doubtful that the Missouri Compensation Commission would have permitted a withdrawal from its jurisdiction if objection had been made" (Br.6). (On page 8 of their original brief, petitioners pointed out that Carroll never procured an award from the Missouri Commission and never even filed his claim with that Commission (R.98, 94, 35-37).) This amounts to a complaint on the part of respondent that Carroll should not be permitted to protect his rights. Petitioners are mindful of no principle which prohibits a litigant from taking a position consistent with the facts and permitted by law which will enhance his prospect of success.

Petitioners maintain that, from the time of his injury on January 26, 1953, Carroll had the right to claim and

obtain compensation benefits under the Arkansas Act and that the doctrine of election of remedies does not preclude him from asserting that right, as he did, promptly upon his discovery, on October 10, 1953, that he had such a right.

It is clear that, from the time of his injury, Carroll had the right to claim benefits under the Arkansas Act. In *Pacific Employers Insurance Company* v. *Industrial Accident Commission of California*, 306 U.S. 493, 83 L. Ed. 940, 59 S. Ct. 629, this Court, after observing that the full faith and credit clause of the Constitution of the United States cannot override the constitutional authority of a State to "legislate for the bodily safety and economic protection of employees injured within it", said (p.503):

> "*Few matters could be deemed more appropriately the concern of the State in which the injury occurs or more completely within its power*" (italics supplied).

We pass now to a consideration of respondent's argument that the decision in *Bradford Electric Light Company, Inc.* v. *Clapper, Admx.*, 286 U. S. 145, 76 L. Ed. 1026, 52 S. Ct. 571, 82 A. L. R. 696, reverses the well-settled doctrine of the *Pacific Employers Insurance Company* case.

II

The Decision in Bradford Electric Light Company Inc. v. *Clapper, Admx., Is Not Controlling*

Respondent's principal contention for an affirmance of the judgment of the Court of Appeals is based upon the decision in the *Clapper* case. In fact, it is hardly an overstatement to say that respondent's sole reliance is upon that opinion (Br.18).

Before discussing the *Clapper* case, is it important to call the Court's attention to the facts (1) that the em-

ployer-employee relationship did not exist between respondent, Lanza, and petitioner, Carroll, and (2) that the established public policy of Arkansas permits a common law action for negligence to be maintained in all cases except where that relationship exists and that, consequently, it would be obnoxious to that policy to hold otherwise.

In *Anderson* v. *Sanderson & Porter*, 146 F. 2d 58, 60, the United States Court of Appeals for the Eighth Circuit pointed out that the provision of the Missouri Act differs in controlling respects from the corresponding but different provision of the Arkansas Act upon the question whether an employee of a subcontractor who has secured workmen's compensation on his employees may maintain a common law action for damages against the prime contractor. In *Bunner* v. *Patti*, 343 Mo. 274, 121 SW 2d 153, and *New Amsterdam Casualty Company* v. *Boaz-Kiel Construction Company*, 8 Cir., 115 F. 2d 950, which cases were cited in the *Anderson* case, it was held that, under the Missouri Act, such a suit was not permitted. However, in the *Anderson* case, which involved the construction of the provision of the Arkansas Act, the Court of Appeals held firmly (in 1945) that such a suit could be maintained.

It was not until December 6, 1954, that the Supreme Court of Arkansas was called upon to determine the question. On that day, in *The Balduin Company* v. *Maner, Judge*, 273 SW 2d 28, that Court, following the doctrine of the Court of Appeals in the *Anderson* case, construed the Arkansas Act to permit an employee (*e. g.*, Carroll) of a subcontractor (*e. g.*, Hogan) carrying workmen's compensation insurance to maintain a common law action for damages against the prime contractor (*e. g.*, Lanza). In other words, the Supreme Court of Arkansas held, *mutatis mutandis*, that the employer-employee relationship did not exist between respondent, Lanza, and petitioner,

Carroll, in consequence of which there was nothing to prevent Carroll from maintaining a common law action for negligence against Lanza.

The rule, firmly embedded in the decisions of the Supreme Court of Arkansas, has been ever since the Arkansas Workmen's Compensation Act was adopted in 1940 that, "except in cases arising between employer and employee, no law shall be passed limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property". *Young, Admr.* v. *G. L. Tarlton, Contractor, Inc.* (1942), 204 Ark. 283, 288, 162 SW 2d 477, 479. In its unanimous opinion in *The Baldwin Company* case, the Supreme Court of Arkansas said (273 SW 2d 30):

> "Prior to 1938 section 32 of Article 5 of the constitution of Arkansas provided: 'No act of the General Assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons or porperty * * *.' By Amendment 26, adopted in 1938, the constitutional provision under consideration was amended to read as follows: 'The General Assembly shall have power to enact laws prescribing the amount of compensation to be paid by employers for injuries to or death of employees, and to whom said payment shall be made. It shall have power to provide the means, methods, and forum for adjudicating claims arising under said laws, and for securing payment of same. Provided, that otherwise no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property * * * *.' *It is clear that Amendment 26 gives to the legislature the power to limit the amount of recovery only in cases where there is an employer-employee relationship*" (italics supplied).

The Court then quoted with approval the language above referred to from the opinion in the *Young* case.

Thus the Arkansas constitutional provisions and the cases construing them establish beyond any question that the public policy of Arkansas permits common law actions for damages to be maintained in all cases except where the employer-employee relationship exists. Respondent has always conceded that Hogan, not the defendant, Lanza, was Carroll's contractual employer. But respondent contended that Lanza was Carroll's statutory employer and that, consequently, Carroll was precluded by the Arkansas Workmen's Compensation Act from maintaining a common law action for damages against Lanza. Under identical circumstances, the same contention was made by the defendant (petitioner) in *The Baldwin Company* case and was rejected by the Supreme Court of Arkansas. 273 SW 2d 31.

It follows that the established policy of Arkansas permits a common law action for negligence to be maintained under a state of facts such as those which obtained in the case at bar.

Respondent says that it is "apparent that the facts in the *Clapper* case and facts in the instant case are essentially identical" (Br.8), and argues that "since the fact situation in the instant case is identical (with that in the *Clapper* case), it follows that the *Clapper* case must control" (Br.10). But the "fact situation" in the two cases is neither "identical" nor "essentially identical", as appears from respondent's own statement of the facts.

Respondent accurately says that the *Clapper* case "involved a Vermont resident employed in the State of Vermont by a Vermont employer, such employee having received injuries, resulting in his death, in the State of New Hampshire" and that a "common law action for negligence was filed *against the employer* in the State of New Hampshire" (Br.7) (italics supplied). Respondent also

correctly states that the case now before the Court "involves a resident of Missouri employed in Missouri by a Missouri employer" and that the employee was injured in the State of Arkansas and filed a common law action for damages in an Arkansas State Court *against one who is an employer under the Missouri law*" (Br.8) (italics supplied).

The difference in the factual situations is obvious at a glance. In the *Clapper* case, it was conceded on all sides that the *defendant was the employer of the plaintiff* (286 U. S. 150-151), while, as has already been shown, Lanza was neither the contractual employer nor the statutory employer of Carroll. Respondent was careful to say that the instant case was "*against one who is an employer under the Missouri law*". But the question is whether the action was against one who was Carroll's employer under the law of *Arkansas*, where the cause of action arose and where the suit was tried. Clearly, it was not such a suit. It follows that the controlling fact in the *Clapper* case is the opposite of the controlling fact in the instant case. Consequently, the *Clapper* case is not in point.

The Vermont statute provided that it should have extra-territorial effect, just as the Missouri statute, upon which respondent relies, provides that it shall have extra-territorial effect as to injuries received outside of Missouri if the contract of employment is made in Missouri. This Court held that New Hampshire was required to give full faith and credit to the Vermont statute and that *Clapper's* cause of action in New Hampshire was barred. But the Court based its decision largely upon the fact that there was "no adequate basis for the lower court's conclusion that to deny recovery would be obnoxious to the public policy of New Hampshire". 286 U. S. 161.

It has already been pointed out that the established public policy of Arkansas permits common law actions for negligence to be maintained in every case except where the employer-employee relationship exists, and that that relationship does *not* exist in the case now before the Court. This brings the instant case squarely within the rule announced in the *Pacific Employers Insurance Company* case, in which this Court held that "full faith and credit does not here enable one State to legislate for the other or to project its laws across State lines so as to preclude the other from prescribing for itself the legal consequences of acts within it". 306 U. S. 504. The Court there said (306 U. S. 504):

> "The Clapper case cannot be said to have decided more than that a state statute applicable to employer and employee within the state, which by its terms provides compensation for the employee if he is injured in the course of his employment while temporarily in another state, will be given full faith and credit in the latter *when not obnoxious to its policy.* See *Bradford Electric Light Co.* v. *Clapper, supra,* page 161, 52 S. Ct. page 576" (italics supplied).

While *Smith* v. *Arkansas Power & Light Company* (1935), 191 Ark. 389, 86 SW 2d 411, was decided before the Arkansas Workmen's Compensation Act was adopted in 1940, it shows how zealously the Supreme Court of Arkansas protects the right of the courts of that State to entertain tort suits based upon causes of action occurring within the boundaries of Arkansas. The Court there said (p.395):

> "It is true, of course, as appellant insists, that, as he was injured in this State, his right to recover compensation for those injuries and the amount therof must be determined by the laws of this State, uninfluenced by the compensation laws of the State in which plaintiff was employed" (citing cases).

The context shows that the expression, "his right to recover compensation", means his right to recover a judgment for damages, not workmen's compensation insurance. The *Smith* case is typical of a line of decisions in the Supreme Court of Arkansas, all of which hold that the public policy of that State is to maintain inviolate the common law right of action for damages in the courts of that State as to all causes of action arising in Arkansas except where the employer-employee relationship exists.

Respondent then falls back to this contention (Br.15):

> "Since the public policy of the State of Arkansas with regard to workmen's compensation was reversed by the constitutional amendment of 1938, decisions prior to 1938 are of no significance on the question of public policy of the State of Arkansas."

However, as has been pointed out, the Supreme Court of Arkansas, in the *Young* case and in *The Baldwin Company* case, both of which arose *after* the adoption of the Arkansas Workmen's Compensation Act, held that the public policy of Arkansas has been reversed by Amendment No. 26 *only* in cases where the employer-employee relationship exists.

It follows, therefore, that the established public policy of Arkansas is that a suit for common law negligence may be maintained in the courts of that State in every case except where the employer-employee relationship exists, and that, since the action now before the Court is not such a case, a decision that such a suit cannot be maintained would be obnoxious to the public policy of Arkansas.

III

The Result Reached by the Court of Appeals Is Not Sound and Is Not in Harmony With Other Decisions

The cases and the quotations from the Restatement, Conflict of Laws, cited under III of respondent's brief, are not relevant to the instant case for the reason that, as in the *Clapper* case, they involve the employer-employee relationship. That relationship does not exist in the case now before the Court.

CONCLUSION

Carroll never "elected" to come within the coverage of the Missouri Act for the reason that, during the time he was receiving compensation payments thereunder, he did not know he had rights under the Arkansas Act.

Moreover, the *Clapper* case is not in point for the reasons (1) that respondent, Lanza, was not the contractual employer or the statutory employer of petitioner, Carroll, and (2) that it is against the established public policy of Arkansas to prevent the maintenance of common law actions for negligence except in cases where the employer-employee relationship exists.

Accordingly, the judgment of the Court of Appeals should be reversed and the cause remanded, with directions to that Court to affirm the judgment of the District Court.

Respectfully submitted,

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March 29, 1955